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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-869

OLYMPIA BREWING COMPANY,
a corporation,

Petitioner,

v.

DEPARTMENT OF REVENUE,
State of Oregon,

Respondent.

BRIEF OF THE DEPARTMENT OF REVENUE, STATE OF OREGON OPPOSING PETITION FOR WRIT OF CERTIORARI

LEE JOHNSON
Attorney General

THEODORE W. de LOOZE
Chief Tax Counsel

WALTER J. APLEY
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Phone (503) 378-4994
Counsel for Respondent

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QUESTION PRESENTED FOR REVIEW

The respondent, Department of Revenue, State of Oregon, hereinafter referred to as "Department" admits that the judgment of the Supreme Court of the State of Oregon is a proper subject for review by this court, but it disagrees with the petitioner's description as to the Question Presented for Review.

A more acceptable and definitive question is the one employed by the trial court, the Oregon Tax Court, which was as follows:

> "Is the plaintiff's regular use of the beer kegs such local 'activity' or 'involvement' as to constitute

sufficient nexus under Public Law 86-272?" (Pet. Pet. for Writ 26)

STATEMENT OF THE CASE

The Department accepts substantially all of the petitioner's statement of the case as set forth in its brief and objects only to the argumentative references to *Heublein, Inc. v. South Carolina Tax Comm.*, 409 U.S. 275, 93 S. Ct. 483 (1972).

The Department would as a proper and necessary addition to a complete statement of the case include the physical fact that a constant inventory of barrels having a value of between $60,000 to $200,000 belonging to petitioner was maintained in the State of Oregon at all times during the tax years at issue.

ARGUMENT

A. The United States Supreme Court in *Heublein, Inc. v. South Carolina Tax Comm.*, 93 S. Ct. 483, 34 L. Ed2d 470 (1972) did not in its decision provide any guidance in determining specific factors that would bring an interstate business within or without the ambit of Public Law 86-272.

The Department does not share petitioner's view that the recent decision of the United States Supreme Court in *Heublein, Inc. v. South Carolina Tax Comm., supra,* clarified the limitations of Public Law 86-272, 15 U.S.C. ¶ 381 et seq., hereinafter referred to as PL 86-272. There was admittedly present in the *Heublein* case a situation where there were physical factors that might have pre-

sented the issue as to whether the business activities of its personnel exceeded the solicitation of orders. There was one employe present who performed certain duties within the State of South Carolina, but the court said that it was not necessary to decide whether the activities of this employe in maintaining a local office, meeting with retailers, distributing promotional material and personally delivering some orders to the distributors, fell within the term "solicitation".

The court did cite as a recognition of the problem, the cases of *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P2d 375 (1965) and *Clairol, Inc. v. Kingsley*, 109 N.J. Super 22, 262, A2d 702 (1970) appeal dismissed, 402 U.S. 902, 28 L. Ed2d 643, 91 S. Ct. 1377 (1971). However, the court then based its decision on the fact that the corporation being taxed had transferred property to its distributor within the state. It sustained the State of South Carolina's right to require that plaintiff's property consisting of liquor be held within the state, since this regulatory scheme served a legitimate state purpose and was not admitted for the express purpose of avoiding PL 86-272.

In the case at issue we are in no way concerned with any regulatory scheme or state regulation governing or affecting the conduct of the petitioner's business in Oregon. Instead the state court has considered the petitioner's voluntary business operation in the State of Oregon and concluded that it was without the immunity from corporation income taxation that was afforded by PL 86-272.

B. Petitioner's activities in Oregon including the utilization of its business property remove it from the protection of PL 86-272.

The position of the Department in its declaratory judgment holding that petitioner's activities in Oregon exceeded the area of protection afforded by PL 86-272 was not based solely on the presence of petitioner's property in Oregon. The Department found that the promotion of petitioner's beer product in Oregon was in excess of mere solicitation. This it did on the basis of stipulated evidence that the role of petitioner's 8 to 14 resident employes in Oregon consisted to a substantial degree of activities that were not primarily directed to merely soliciting orders. These activities included the promotion of the good will of the employer's product after actual sales had been consummated, taking inventory, checking supplies, preparing displays and in general performing services calculated to avoid anything that might adversely affect petitioner's beer sales.

Similar activities were found in *Clairol, Inc. v. Kingsley*, 109 N.J. Super 22, 262 A2d 702 (1970) to be in excess of mere solicitation.

The Oregon Supreme Court in affirming the lower court's holding petitioner subject to Oregon income taxation expressed no opinion as to whether the trial court was correct in finding that those particular activities did not exceed solicitation of orders. Instead the Oregon Supreme Court merely agreed that the presence of petitioner's property in Oregon subjected it to the Oregon corporation income tax laws.

Since this court in the *Heublein* case similarly found it unnecessary to decide whether certain acts of the taxpayer's representative did or did not fall within the term "solicitation", the Department, while not abandoning its position that the petitioner's activities exceeded "mere solicitation", will direct its argument primarily to the findings as delineated and relied upon by the Oregon Tax Court and affirmed by the Oregon Supreme Court.

At the outset in describing the use to which petitioner's property was utilized in Oregon, it is not sufficient to refer to the beer kegs as returnable containers. It is a matter of general knowledge that beer kegs are used by the beer industry in business establishments such as taverns and cocktail lounges for the primary purpose of dispensing beer. The property in the State of Oregon is not of such a transient nature as petitioner would imply when it uses the description "returnable kegs". The role of this property is not just that of a container. It is used to preserve the quality of the product at the purchaser's premises, to store the product and to facilitate the dispensing of the petitioner's product to be sold to the public. We have a situation where property is utilized to generate income involving substantial physical assets that are no longer in the stream of interstate commerce. This is far in excess of containerization and part of the delivery process which petitioner states is the sole purpose of beer kegs.

C. The factual determination as to the sufficiency of business activities in excess of mere solicitation is the province of state courts, and these findings should be set

aside only upon a showing of arbitrary disregard of the evidence presented.

That PL 86-272 limiting state taxation of interstate commerce was a temporary solution having limited purposes is clear and while almost 15 years have passed since this law's enactment, no new restrictions on the states have been imposed. The problem of what activities come within the protective ambit of PL 86-272 has been properly left to the state courts to view each case on the individual facts. The Oregon Supreme Court has had occasion to interpret PL 86-272 in a diverse number of cases. In *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P2d 375 (1965) it held that PL 86-272 was constitutional. In *Cal-Roof Wholesale v. Tax Com.*, 242 Or. 435, 410 P2d 233 (1966), it held that the term "solicitation" as used in PL 86-272 should not be given a broad interpretation. In *Herff Jones Co. v. Tax Com.*, 247 Or. 404, 430 P2d 998 (1967), it re-emphasized its interpretation by holding that it was clear that in order to come within the purview of PL 86-272 the *only* business activity which plaintiff's sales representatives could engage in was solicitation of orders. The court again interpreted the term "solicitation" in *Iron Fireman Co. v. Tax Com.*, 251 Or. 227, 445 P2d 126 (1968) and re-emphasized its belief that the term should be given its generally accepted meaning in the light of its legislative history. (See S. Rep. No. 658, 86th Cong. 1st Sess. (1959); H.R. Rep. No. 936, 86th Cong.. 1st Sess. (1959); H.R. Conference Rep. No. 1103, 86th Cong. 1st Sess. (1959); see also, Beaman, *Paying Taxes to Other States,* ch. 6,

p. 63 (1963); Barnes, *State Taxation of Interstate Commerce*, 16 W. Res. L. Rev. 859, at 871 (1965)).

It is the Department's position that the approach that the Oregon Supreme Court has taken has given full recognition to the Congressional intent behind PL 86-272. As a result the decisions in most cases have required the State of Oregon to allocate income of corporations to other states having activities in excess of mere solicitation of orders. In general the Oregon Supreme Court has reviewed each business operation in the light of its own particular facts. Wherever the activities are demonstrated to be beyond mere order taking, and the jurisdiction to tax exists, such business operation must apportion its income among the states where it has business activities. The result is a fair and equitable tax result with income properly attributed to its source.

D. The presence of property which generates income within a state is by itself sufficient nexus to authorize taxation of income.

The Oregon Supreme Court in the case of *American Refrig. Transit Co. v. Tax Com.*, 238 Or. 340, 346, 395 P2d 127, 130 (1964) considered this particular matter in a case involving the right of Oregon to impose its corporation income tax where the only activity of the taxpayer was the leasing of railroad refrigerator cars which in turn did have a "situs" within the state.

On this point the Oregon court's reasoning can best be summarized in its observation that:

> "The nexus exists whenever the corporation takes advantage of the economic milieu within the state

> to realize a profit. The state is entitled to tax if the benefits it provides are a substantial economic factor in the production of the taxpayer's income. These benefits are found in the maintenance of conditions essential to the production or marketing of goods. They may be realized simply in the protection of the taxpayer's property used in the production of income."

In the case at issue we are not dealing with some trivial amount of property where the state is attempting by a technicality to subvert the intent of PL 86-272. The property consisting of beer kegs is not related to the "solicitation" phase of the petitioner's business at all. Rather, the property is an integral and necessary part of petitioner's business, having a situs and being used within the State of Oregon to generate income for the petitioner's business. The petitioner taxpayer has in the conduct of its business taken advantage of the economy milieu of Oregon to produce income and sufficient nexus exists to impose state taxation. The petitioner's voluntary manner of transacting business in the State of Oregon has brought him within the protection of the federal legislation, PL 86-272.

CONCLUSION

The records and files in this matter including a stipulation of facts conclusively show that the petitioner's business activities in the State of Oregon were without the protective provisions of PL 86-272, and the petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEE JOHNSON
Attorney General

THEODORE W. de LOOZE
Chief Tax Counsel

WALTER J. APLEY
Assistant Attorney General
Attorneys for Respondent